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(City and County—Organized 1888)

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The Use of Affidavits as Evidence

By HONORABLE HARTLEY SHAW
Judge of the Superior Court, County of Los Angeles

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA
HARTLEY SHAW, JUDGE

November 29, 1926.

R. H. Purdue, Assoc. Editor
Bar Association Bulletin

Dear Sir:

For my use in the Order to Show Cause Department of the Superior Court, where a great many matters are presented on affidavits, I have made a compilation of California authorities on the use of affidavits as evidence, with particular reference to the manner and form in which the facts must be stated to entitle such affidavits to consideration.

In response to your request for some contribution by me to The Bar Association Bulletin, I enclose you herewith a copy of my memorandum of these authorities. While the compilation is probably not exhaustive, it includes all the California decisions on the subject above-mentioned that I have been able to find as a result of considerable research.

I trust that it may prove of some use to attorneys who are preparing affidavits for use in court.

Yours very truly,

HS/M *HARTLEY SHAW.*
Enclosure

WHEN AFFIDAVITS MAY BE USED

"An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code." C. C. P. 2009.

Affidavits may be used only in the cases expressly permitted by the code. In other cases they are not evidence and will not support an order based on no other showing. Estate of Paulsen, 35 Cal. App. 654, 656.

An affidavit cannot be used to prove facts the existence of which are made issues in the case, upon the trial of an action. Section 2009, *supra*, was not intended to change the rules of evidence by substituting voluntary ex parte affidavits for the testimony of witnesses. Lacrabere vs. Wise, 141 Cal. 554, 556.

Provisional remedies, as listed in the code are: Arrest and Bail, Claim and Delivery of Personal Property, Injunction, Attachment, Receivers, and Deposit in Court. (C. C. P. 478-574.) A motion is an application for any order not included in a judgment. (C. C. P. 1003.) No attempt is made to list here the other cases in which provision is made for the use of affidavits.

STATEMENTS IN THE ALTERNATIVE

An affidavit for attachment which alleges two grounds of attachment in the alternative is insufficient. Hawley vs. Delmas, 4 Cal. 195; Wilke vs. Cohn, 54 Cal. 212 ("this affidavit, stating both in the alternative, in fact states neither"); Winters vs. Pearson, 72 Cal. 553; Merced Bank vs. Morton, 58 Cal. 360.

An affidavit in support of an application to purchase state land, which alleges two facts in the alternative, is not sufficient, although either fact alone would be sufficient. The facts required "must be stated directly and positively, and not in an alternative form." Botsford vs. Howell, 52 Cal. 158.

An affidavit for continuance, stating in the alternative that the personal attendance of witnesses or their depositions can be procured, is insufficient. No conviction of perjury could be had on such an affidavit. People vs. Francis, 38 Cal. 183, 187.

STATEMENTS ON INFORMATION AND BELIEF

On a motion for relief under C. C. P. 473, the court is authorized to disregard affidavits which are hearsay, based on information of others. Moore vs. Thompson, 138 Cal. 23, 26.

On a motion to set aside a default an affidavit of merits made by defendant's attorney to the effect that his client has fully and fairly stated the facts of the case to him is hearsay and therefore entitled to no weight. Bailey vs. Taafe, 29 Cal. 422, 426; Jenkins vs. Gamewell, etc. Co., 3 Cal. Unrep. 655, 31 Pac. 570.

On a hearing of an application for a temporary injunction, no weight at all can be given to affiant's denial of a fact based on want of any information whatever. Menke vs. Lyndon, 124 Cal. 160, 163.

On an application to set aside a default under C. C. P. 473, an affidavit stating that affiant is informed and believes that certain facts exist is not entitled to be considered by the court. "The Code authorizes allegations of a pleader to be made upon information and belief; but an affidavit which is to be used as evidence must be positive and direct." Pellegrini vs. McCloud River Lumber Co., 1 Cal. App. 593, 597.

The general rule is that an injunction may not issue upon an affidavit, the contents of which are stated upon information and belief. Kelsey vs. McMillen, 66 Cal. App. 386, 389.

An allegation in a complaint made on information and belief, and positively denied under oath in the answer, will not support a temporary injunction. County of Yuba vs. Cloke, 79 Cal. 239, 245.

An affidavit for publication of summons made by plaintiff's attorney to the effect that he is "informed by the plaintiff" that certain facts are true is insufficient to show the existence of a cause of action. "When the statute uses the words 'appears by affidavit' it means more than an affidavit as to what someone told the party making the affidavit." Columbia Screw Co. vs. Warner Lock Co., 138 Cal. 445, 447.

An affidavit to be used in extradition proceedings, stating that affiant "has reason to believe and does believe" certain facts showing the commission of a crime by the defendant, is insufficient because made on information and belief. Ex parte Spears, 88 Cal. 640.

A mere affidavit on information and belief is insufficient to support a warrant of arrest on a criminal charge. Ex parte Dimmig, 74 Cal. 164.

On a motion for new trial on the ground of newly discovered evidence, the affidavit of the party as to the testimony to be given by the newly discovered witnesses is but hearsay testimony and cannot be received unless, for good cause shown, the affidavits of such witnesses cannot be had in time. Arnold vs. Skaggs, 35 Cal. 684, 688; Jenny Lind Co. vs. Bower, 11 Cal. 194, 199; People vs. De Lacey, 28 Cal. 589; Chase vs. Codding, 38 Cal. 191, 194.

On a motion for a new trial, an affidavit on information and belief cannot be considered. "Ordinarily an affidavit made solely on information and belief is unavailing for any purpose. The statute allows such affidavits for certain prescribed purposes—as, for instance, in the verification of pleadings—but there is no statutory provision authorizing such an affidavit in a case like the one

at bar. . . . . Where a statute provides that the evidence upon a certain question must be presented by affidavit, it simply means that the competent and material testimony must be presented by the affidavits of the witnesses. . . . We cannot see that the reasons stated in the affidavit for the making of the same on information and belief—viz.: that the persons who knew the facts had refused to make affidavit—can alter the situation." Gay vs. Torrance, 145 Cal. 144, 151; Kimic vs. San Jose, etc. Co., 156 Cal. 379, 396.

Affidavits based on information and belief especially where the sources of the information are readily obtainable but are not brought forward, have but weak probative force as ground for change of place of trial, and if standing alone are not sufficient to authorize the change. Higgins vs. San Diego, 126 Cal. 303, 314; People vs. Shuler, 28 Cal. 490, 495; People vs. Yoakum, 53 Cal. 566, 568.

On an objection that the judge is biased against the defendant an affidavit based on information and belief, and not even giving the sources of the information, cannot be considered. People vs. Williams, 24 Cal. 31, 36; Lamberson vs. Superior Court, 151 Cal. 458, 464.

On a motion for a new trial of a criminal case, affidavits on information and belief as to misconduct by the jury are "utterly valueless and constitute no evidence" of misconduct. People vs. Feld, 149 Cal. 464, 478; People vs. Hower, 151 Cal. 638; People vs. Findley, 132 Cal. 301, 308; People vs. Williams, 24 Cal. 31, 39; People vs. Chin Non, 146 Cal. 561, 566; People vs. Tarm Pio, 86 Cal. 225, 231.

INFORMATION AND BELIEF ADMITTED OR NOT DENIED

Where facts stated in an affidavit on information and belief are of matters peculiarly within the knowledge of the defendant and are not denied by him, they may be considered on the granting of an injunction. Kelsey vs. Miller, 66 Cal. App. 386, 389.

Facts stated in a complaint on information and belief and not denied in the answer, may be considered on the granting or dissolving of a temporary injunction. Hiller vs. Collins, 63 Cal. 235, 237.

A fact alleged in a verified complaint on information and belief may be considered on an application for a temporary injunction where such fact is admitted by the answer. Lutz vs. Western I. & M. Co., 190 Cal. 554, 559, 560.

CONCLUSIONS AND OPINIONS

On a hearing of a motion for relief under C. C. P. 473, the court is authorized to disregard affidavits which are the opinions of affiants. Moore vs. Thompson, 138 Cal. 23, 26.

In an affidavit for publication of summons a statement which merely repeats the language of the statute is a mere conclusion and is insufficient. It must state facts which support the conclusion. Ricketson vs. Richardson, 26 Cal. 149, 153.

An affidavit for publication of summons which states that plaintiff "has a good cause of action" against defendant is a mere statement of opinion or belief. "The affiant's general expression of opinion or belief, without the facts upon which it is founded, is in no sense legal evidence, and does not tend in any degree to prove the jurisdictional facts." Forbes vs. Hyde, 31 Cal. 342, 353; County of Yolo vs. Knight, 70 Cal. 431; Estate of Hancock, 156 Cal. 804, 810.

On a motion for change of venue, the affidavit of another person stating that defendant is a resident of a certain place, is a mere conclusion and without any

(Continued on Page 27)

Los Angeles Bar Association

Meeting and Dinner Postponed from Thursday, December 9, to Friday, December 17

Outline of Programs for December, January and February Meetings

In order to give members of the Bar Association the privilege of hearing an address by Professor D. O. McGovney, Professor at Law at the University of California, the monthly meeting and dinner of the Association, which was announced for December 9, has been postponed to Friday, December 17. The meeting will be at 6:15 p. m., at the Hotel Alexandria.

Professor McGovney's subject will be, "Consideration for Promise Under the Restatement of the Law of Contract." Professor McGovney is one of the collaborators in defining the restatement of the law for the American Law Institute, and without a doubt his paper will prove most interesting and instructive.

In addition, there will be at the meeting a discussion open to all the members on the following two proposals:

First: Shall the Bar Association recommend to the judges of the Superior Court the abolition of the law and motion calendar as now heard in one department and return to the practise of giving to the judge of each department the opportunity of passing on the pleadings in the cases assigned to him.

Second: Shall the Bar Association recommend the retention or abolition of the transfer system of cases.

Both of these subjects have often been a topic of conversation among the attorneys, and a number of most prominent members of the Bar have already signified their intention of voicing their views at the meeting.

The Program Committee further announces that they have already made arrangements for the meetings of January and February, 1927.

At the January meeting Mr. Robert Jennings will read a paper on the subject of "Liability of Vendors."

Mr. Mark Slosson will read a paper on "Procedure Before the Corporation Commission for the Issuance of Securities."

At the February meeting Mr. Frank James, past president of the Bar Association, will read a paper on "The Law of Options," and Mr. Claire S. Tappaan, of the law faculty of the University of Southern California, who has lately returned from a tour of Europe, will speak on "European Law Systems."

The Committee has also arranged with a number of prominent attorneys and jurists for the delivering of addresses to the Association in the near future. Included among them are the following: Mr. W. T. Craig, Hon. Lewis R. Works, Hon. Gavin W. Craig, and Mr. Emmett Wilson. The subjects on which they are to speak will be announced later. Respectfully submitted,

PROGRAM COMMITTEE,
LEO M. ROSECRANS, *Chairman.*
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KEMPER CAMPBELL.
EVERETT W. MATTOON.
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LEON R. YANKWICH.

A CORRECTION

The readers of the BULLETIN will please note the following correction in the advertisement of the United States Corporation Company appearing on page 9 of the issue of November 18, 1926.

Under the caption, "Liberal Features Attract," it was stated, through error, that "Upon issues of no-par stock an arbitrary value of $1000 per share is set, for the purpose of taxation only"; whereas it should have been stated, "Upon issues of no-par stock an arbitrary value of $100 per share is set, for the purpose of taxation only." The advertisement as it now appears on the opposite page of this issue is correct.

We are glad to rectify this typographical error for the United States Corporation Company. Advertisers in the BULLETIN are worth while friends of the Bar Association, and we are anxious to procure for them the very best possible results from their advertisements.

Delaware Issues Charters To Big Number of Firms

(By Associated Press)

DOVER, Del., Oct. 29.—Attracted to this state by one of the most liberal general incorporation laws found in the Union, between 65,000 and 70,000 corporations throughout the nation today are doing business under Delaware charters.

The features of the law which has made the state a Mecca to incorporators are few, but compelling. It is easy to comply with. It is speedy in operation. And it restricts the state's interest in, and supervision over, its charter holders to the apparent minimum compatible with the protection of stockholders.

LIBERAL FEATURES ATTRACT

Financially, Delaware requires an organization fee of ten cents per $1000 for the first $2,000,000 of authorized capitalization, and five cents per $1000 thereafter. Upon issues of no-par stock an arbitrary value of $100 per share is set, for the purpose of taxation only. Because of this latter provision, the total corporate value of Delaware charters is undeterminable.

The annual tax also is levied, on the basis of authorized capitalization. Simple annual reports are necessary, but they do not require disclosure of the corporation's financial affairs. Of all the company's books and records, only an original or duplicate stock ledger must be kept in Delaware. Here, except for provisions safeguarding stockholders, the state's interest ceases.

STOCK NOT TAXED

Stock held by non-residents is not taxed, nor is it subject to an inheritance levy. The corporation itself has no income tax to pay.

Incorporation can be completed within 24 hours. The incorporators need not personally appear or even be named. They may attend their first incorporators' meeting by proxy; the minutes and stock ledger will be mailed to them anywhere in the United States. Stockholders' and directors' meetings may be held anywhere.

Other powers of a Delaware corporation include issuance of any class of stock desired, with or without voting powers, and with no limitation upon the relative amounts issued or the rate of dividends.

CORPORATIONS ORGANIZED FOR LAWYERS

Rights of Owners of Burial Lots*

By HAROLD W. JUDSON *of the Los Angeles Bar*

The writer has previously discussed the elements involved in determining whether or not there has been a dedication of lands for burial purposes. Assuming, then, that these elements of a dedication are present, has the owner of a burial lot any such interest in the lands of the cemetery yet unsold or unused for burial purposes as to entitle him to prevent an alienation of such land for use for other purposes than the burial of the dead? And secondly, can he maintain such an action in his own name?

Perhaps the leading authority upon our first question is Close v. Glenwood Cemetery, *supra*, wherein the contention was advanced that the dedication included only the land actually laid out into lots. The U. S. Supreme Court said: "It is argued by the learned counsel for the appellants that the estoppel and the obligation of Close cannot extend beyond the thirty acres which had been actually laid out. * * * It was held out to the lot holders, not only that the ground immediately available for burial should remain set apart for that object, but that the cemetery should be forever under the protection of a perpetual corporation * * * and the *whole* property was described as dedicated to the purposes of the cemetery, not necessarily that the whole should be laid out into lots, but that it should *all* belong to the institution and be available for its general objects." This decision, as well as that next remarked, is peculiarly applicable to California for the reason that it appears in these cases that when the lot owner purchased his lot he became, by that act, a member of the corporation, entitled to participate in its management. Section 609 of the Civil Code makes the same provision.

Under these circumstances the Texas Supreme Court held, in Oakland Cemetery Co., 98 Tex. 569, 57 S. W. 27, that, "Upon dedication, the dominion of the corporation over the land as owner in fee simple was surrendered and the corporation became, in effect, a trustee to sell and convey the lots for the purposes specified * * * with the right to appropriate the proceeds of the sale to itself in payment of the land. Each lot owner has in view that the cemetery ground *as a whole* should be improved and ornamented so as to make it a pleasant place of resort for the friends and relatives of the deceased persons who may be buried there, as well as a place of interment for the dead; * * * he was interested not only in the particular lot conveyed to him, but in the entire ground of the cemetery, to be kept *as an entirety*, and to be perpetuated and cared for by a corporate body."

In the Canadian case of Smith v. Humbervale Cemetery Co., 22 D. L. R. 773, in which three judges wrote separate concurring opinions, the usual situation arose culminating in a desire to sell—"By 1912 the demand for suburban property for building or speculative purposes had given the unsold part of the cemetery an enormously enhanced value." The company sold the land for business sites, resulting in a suit by a lot owner and an incorporator who alleged the company had no power to convey the land for such a use, regardless of whether or not it had been unused for burial purposes. Of this contention Judge Latchford said: "The *whole* fifty acres, and not merely that part of it in which lots were sold and interments made constituted 'the cemetery' which the original company was bound to use 'exclusively as a place for the burial of the dead.'"

The policy of the courts to protect and

*EDITOR'S NOTE: This is the continuation of Mr. Judson's article, the first part of which appeared in the *Bulletin* of November 18.

preserve the *integrity* of the cemetery at all hazards is nowhere better illustrated than in the case of Woodland Cemetery Co. v. Ellison, 23 Ky. Law Rep. 1222; 67 S. W. 14. The facts are quoted—" * * * the directors answered that in their judgment the property was not suitable for cemetery purposes; that when they came to use it they discovered that the rock was too near the surface; that it was found undesirable on this and other accounts." The directors of the company sold the land and with the proceeds " * * * invested in other land more suitable, in their judgment, *for cemetery purposes*, and better located." It was contended by the plaintiffs, "That the sale of this lot marred the attractiveness of the whole for the purposes for which it was originally acquired and dedicated." Of this contention the court said: "We are further of the opinion that without the consent * * * of those who had interred their dead in the cemetery upon the faith of its being perpetually used for the purposes for which it was dedicated, it was not within the power of the directors to sell any part of this property for other purposes than the burial of the dead."

In addition to the California case referred to, there is another which might be suggested as being contrary to the equitable principle established by the decisions just cited. This is the case of McDonald v. Monongahela, 226 Pa. 77; 75 Atl. 38. In that action the land in dispute was sought to be sold to another cemetery company to be used for burial purposes. It was held that the sale could be made * * * so long as the sale proposed does not deprive the lot holders of the use of and reasonable access to their lots or interfere with the *integrity* of the cemetery as a burial place." Obviously, the sale of the land to another company for use for burial purposes did not injure the "integrity" of the cemetery, the only change in the status of the land being in its ownership and not in its use. It is the writer's belief that in the word

"integrity" lies the true and ultimate test by which it may be determined whether or not property once consecrated to use as a part of a cemetery may be alienated from that use.

When the land sought to be sold has been designated and devoted by its owners as a part of the cemetery, and the prospective purchaser of a burial lot has considered such a devotion as being bona fide and permanent; and, when, relying upon such an implied or express dedication he purchases a lot in the cemetery and places his dead thereon—it is inconceivable that the proprietors of the cemetery would thereafter be permitted, for their own enrichment, to allow any of the land so devoted and dedicated to become the scene of business and commercial activities.

This principle of sound morals has been well stated in Chew v. First Presbyterian Church, 237 Fed. 219, where it was said: "For while each owner or holder is directly and immediately interested in the lot controlled by him, he is at the same time interested that its surroundings shall be those appropriate to a well ordered resting place for the ashes of the dead, and not converted into a waste place or a dumping ground for refuse matter, or the accumulation of debris, or into a site for the erection of buildings foreign to the pious or charitable use to which the land has been dedicated and devoted." And that the lot owner can bring an action to prevent such a condition is further decided: "The several owners and holders of lots in a cemetery have a common interest in its decent and proper maintenance *as a whole.* * * * There is abundant authority to the effect * * * that persons having relatives buried in the cemetery may maintain a suit * * * to preserve the premises as a cemetery."

The right of the lot owner to sue in equity to enforce his rights is recognized in this state in Hornblower v. Masonic Cemetery Ass'n., *supra.* In another case, Clark v. Rahway Cemetery Co., 69 N. J. Eq. 636; 61 Atl. 261, it was held that a lot owner is " * * * a person who has acquired a limited interest in a plat which is part of one connected whole, that whole being conducted, maintained and managed by trustees for the benefit of himself and all others similarly situated. His interest is, in some degree, that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice." It is noted that this opinion is founded upon the theory that there is a trust relationship existing between the parties, the lot owners being the beneficiaries. In the Federal case just cited, the court stated that the right of the lot owner existed by reason of an "implied contract" between the lot owners and proprietors of the cemetery that none of the cemetery land would be used for a purpose foreign to that of sepulture. While the trust theory has been the one upon which most of the decisions have been based, it would seem, as both theories are founded upon the same facts and result in an identical conclusion, that any attempted differentiation of them would serve no useful purpose.

The proper method to sue in behalf of the lot owners, where they are either parties plaintiff or defendant, is by joining a number of them as parties under the doctrine of virtual representation. As can be readily estimated, the number of possible parties in litigation involving a cemetery of ordinary size would number many thousand. Due to the fact that this great number of lot owners or relatives of the dead are all theoretically entitled to be made parties, it is usually insisted that the action should be brought or defended by the Attorney-General. This insistence has been decided adversely to its proponents, the most notable instance being the Minnesota case of Brown v. Maplewood Cemetery Co., *supra.* The language of the court upon this point is particularly explicit: " * * * it remains only to consider the position of the respondents that the beneficiaries cannot maintain their action, but a suit for the misuse of its franchise must be brought in the name of the State to dissolve the corporation. * * * The argument for respondents is put in this way:

(Continued on Page 27)

Progress of The Bulletin

The recent enlargement of THE BAR ASSOCIATION BULLETIN is a step in a program of earnest endeavor for the welfare of the Los Angeles Bar Association. It is the aim of the Board of Trustees of the Association and of the Editors of the BULLETIN continually to enhance the merit of the publication, and thereby cause it to be an ever-increasing source of interest and value to the members of our Association.

In the fourteen months of its life, THE BAR ASSOCIATION BULLETIN has made notable strides. It is significant to note that the BULLETIN is one of the very few legal periodicals in all America which is published by a city or county bar association. In fact, only one other such publication now in existence has been brought to the attention of the BULLETIN Editors.

Its mailing list includes the names not only of all members of our Association, but in addition, of a considerable number of laymen in Los Angeles who are interested in legal matters and in the progress of the Bar Association's endeavors to advance the science of jurisprudence. The BULLETIN, furthermore, is sent to every member of the California State Bar Association in Southern California who is not a member of our Bar Association, and to each organized bar association in Southern California. Numerous law schools, as well, receive the publication regularly.

Complete files of the BULLETIN have been requested by the law librarians of the following universities: University of California, Columbia University, Harvard University, University of Iowa, Loyola College, University of Minnesota, University of Southern California, Southwestern University; and also by The Association of the Bar of the City of New York.

The following periodicals are on the BULLETIN Exchange List: AMERICAN BAR ASSOCIATION JOURNAL, AMERICAN LAW REVIEW, AMERICAN LAW SCHOOL REVIEW, THE BRIEF, CALIFORNIA LAW REVIEW, CASE AND COMMENT, THE DENVER BAR ASSOCIATION RECORD, UNIVERSITY OF DETROIT LAW REVIEW, THE DOCKET, GEORGETOWN LAW JOURNAL, IOWA LAW REVIEW, JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, MARQUETTE LAW REVIEW, MICHIGAN LAW REVIEW, THE OHIO LAW BULLETIN AND REPORTER, OREGON LAW REVIEW, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, THE RECORDER (San Francisco), ST. LOUIS LAW REVIEW, THE STATE BAR JOURNAL, WEST VIRGINIA LAW QUARTERLY AND THE BAR, YALE LAW JOURNAL, YEAR BOOK OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

We feel that the BULLETIN merits the hearty support and cooperation of you, as a member of the Los Angeles Bar Association. Your assistance is essential, if the BULLETIN is best to fulfill its mission. The duty devolving upon you assumes a two-fold aspect; first, that of lending support towards financial success; and second, that of furnishing material for publication.

The former duty is discharged by mentioning the BULLETIN when doing business with those who utilize its pages for advertisements.

As to the latter obligation, the BULLETIN must have an abundance of written contributions from which to select reading materials. It is the plan of the Editors to cover a wide variety of subjects of interest to the legal profession. Discussions, therefore, on any current legal topic are acceptable. It also should be noted that reviews of recent decisions by members of the Bar are requested for publication in the section, "Case Notes."

In thus helping the BULLETIN achieve maximum success, you will be performing a real service for the Los Angeles Bar Association and for the profession.

Message of the Los Angeles C of of Certified A

The Value of the C Pu

The idea prevails among a large of th attained the dignity of "Big Business" alue lies merely in making an audit for the of shortage. Nothing can be farther from.

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analyze to ascertain them, and therein lies the ublic Act.

Inapplicability of Supersedeas to Decree Dissolving Corporation

By LEON R. YANKWICH, *of the Los Angeles Bar*
Professor of Law, Loyola College, and Author of CALIFORNIA PLEADING AND PROCEDURE

A recent case, Re Application of Imperial Water Company No. 3 for Dissolution, 72 Cal. Dec. 413 (October 29, 1926), serves to emphasize the uses to which the writ of supersedeas may and may not be put, and fixes the character of an order of dissolution of a corporation and the function of the trustees appointed by the court to wind up the affairs of the dissolved corporation under Sections 1227-1233 of the Code of Civil Procedure and Section 400 of the Civil Code.

Because the writ of supersedeas is not a common one, it may be appropriate to state briefly its uses as declared by decisions prior to the one under discussion.

It is a writ containing a command to stay the proceedings at law.

"It is an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review.

"Originally it was a writ directed to an officer commanding him to desist from enforcing the execution of another writ, which he was about to execute, or which might come into his hands.

"In modern times the term is often used synonimously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment.

"In this state it is frequently granted by the Supreme Court for the purpose of staying proceedings in the Superior Court, when a review of the action of that court is sought in the Supreme Court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment.

"The writ cannot be used to perform the functions of an injunction against the parties to the action restraining them from any act in the assertion of their rights other than to prevent them from using the process of the court below to enforce the judgment.

"When no process is required to be issued for the enforcement of a judgment, no supersedeas is allowed." (Yankwich on California Pleading and Procedure, section 276a.)

In the case under discussion petitioner, Maud Hall, had appealed to the Supreme Court from an order of the Superior Court of Imperial county dissolving the respondent corporation, Imperial Water Company No. 3, and directing the distribution of its funds and property through its directors acting as trustees under the provisions of Section 400 of the Civil Code. Petitioner had filed objections in writing to the application for dissolution upon the ground that she had a valid and unsatisfied claim and demand against the corporation for a large sum of money as damages alleged to have been sustained to her farm lands by reason of seepage of water from irrigation canals of the respondent corporation and had commenced an action for the enforcement of said claim for damages, in which action a judgment had been rendered against petitioner, in the main, and wherein she had likewise prosecuted an appeal from an order denying a motion to set aside said judgment. The application was to obtain a writ of *supersedeas* preventing the directors of the corporation from distributing its assets in accordance with the order of dissolution until such time as peti-

tioner's appeal in her own case could be determined. The allegations of the petition were that the directors of the respondent corporation would distribute all the funds and property of said corporation and that none thereof would be left for the payment of whatever claim the petitioner might eventually establish.

Denying the writ, the court held that because "the order dissolving the corporation . . . and directing the distribution of assets through its directors, as trustees, is a self-executing order for the enforcement of which no process of the lower court need be employed," and because the trustees are *not officers of the court*, to which a writ of supersedeas could be directed, but *mere statutory liquidators*, no supersedeas can issue.

In so ruling, the Supreme Court gave full effect to its prior declarations as to the nature of the writ of supersedeas, summarized above.

Its ruling as to the nature of a decree of dissolution is, likewise, grounded on a solid foundation.

The order of the court allowing the corporation to dissolve is self-executing. By the very order, the corporation stands dissolved.

Thereafter, there remain only the trustees, whose powers are the same as those of the directors of a corporation which has forfeited its charter: Rossi v. Caire, 174 Cal. 74; Anthony v. Jannsen, 183 Cal. 329; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393; Nezik v. Cole, 43 Cal. App. 130; Civil Code, section 400.

The duties of these trustees are measured by their powers and by the principles of law and equity applicable to the conditions. They have in their possession property belonging to others,—they are bound to settle the affairs of the former owner. They have all the power to deal with and dispose of the property that is necessary to accomplish that purpose.

(Continued on Page 26)

The Doctrine of Charitable Trusts in California

By Louis Thomsen, J. D.

Lawyers are commonly familiar with many of the phases of trusts, the field or branch of law relating to trusts having become in recent years one of tremendous importance. However, the forms of trusts most generally dealt with in practice differ quite radically from charitable trusts. In view of the distinctive characteristics of charitable trusts, and because certain of these characteristics may have escaped the attention of members of the profession, it shall be the purpose of the writer in this discussion to bring out the salient points relating to such trusts.

CHARITY DEFINED

"Charity," in its popular sense differs from "charity" in its legal sense. In its widest popular sense, the term denotes all good affections which men bear toward each other, and, in its narrower popular sense, the term denotes relief to the poor.

In its legal sense, the term has been defined in many ways. In the case of Jackson vs. Phillips, 96 Mass. (14 Allen) 539, at 556, Judge Horace Gray laid down the following definition of charity:

> "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

This definition includes the four existing classes of charities, of which we shall hereafter speak; namely, educational, religious, eleemosynary, and municipal. The definition also lays down the main elements of a legal charity; to-wit, conformity with law, indefiniteness of beneficiaries, and a charitable purpose. This definition has been accepted in California and is consistently quoted with approval in the cases dealing with charities. (People v. Cogswell, 113 Cal. 129; Estate of Dol, 182 Cal. 159; Estate of Hinckley, 58 Cal. 457, at 488; Estate of Lennon, 152 Cal. 327.)

ORIGIN OF CHARITIES AND CHARITABLE JURISDICTION

The law of charitable uses finds its origin in the Bible. Heathenism was devoid of charity; no trace of charity can be found in the Code of Hamurabi, nor in the Twelve Tables of the early Roman Law, nor in the Code of Lycurgus. The law of charitable uses had its inception in the great Command, "Love thy neighbor as thyself."

The Jewish people, before the time of Christ, had a legally defined plan for charitable relief. This system can be gathered from the Code of Moses; thus we find this statement in Leviticus, Chap. 23, Verse 22:

> "When ye reap the harvest of your land, thou shalt not make clean riddance of the corners of thy field when thou reapest, neither shalt thou gather any gleanings of thy harvest; thou shalt leave them unto the poor, and to the stranger."

The doctrine of charitable uses was introduced into England with the advent of the Christian religion; the law of charity was early engrafted upon the common law and derived its general maxims from the civil law, as modified in the latter periods of the Roman Empire by the Ecclesiastical elements introduced with Christianity. It was not founded on any statute, as it existed independently of written law. It was, however, evidenced by both cases decided, and statutes passed, before the time of Elizabeth.

In 1601 there was enacted in England a statute known as the Statute of Elizabeth. This statute enumerated what things or causes

were charitable and declared that such purposes should be carried out according to the intent of the donors. The statute, however, did not create charitable trusts—they existed outside, and independently, of it; nor did courts of equity acquire jurisdiction over charities by virtue of the statute—such jurisdiction existed prior to its enactment. The jurisdiction of the English courts of Chancery over charitable trusts seems to have rested on three foundations: to-wit, their ordinary jurisdiction over trusts, the prerogative of the crown (of which we shall speak hereafter), and the Statute of Elizabeth.

The jurisdiction of American courts over charitable trusts depends upon the existence or non-existence of one or more of these three elements. American states reject the royal prerogative and many also have refused to adopt the Statute of Elizabeth. Thus, whether or not courts have jurisdiction over charities depends, in those cases where prerogative *cy pres* is not recognized, and where the Statute of Elizabeth has not been adopted, upon whether or not there is an equity jurisdiction over charities outside of these two forces.

In the Estate of Hinckley, 58 Cal. 457, the Supreme Court, speaking through Judge McKinstry, in considering the question whether or not the California courts have jurisdiction over charities, said, at page 490:

> "We are thus conducted to the consideration of the questions: Did the court of Chancery in England, as part of its ordinary jurisdiction, have power to establish and administer charities? If so, what was the nature, and what were the limits of that jurisdiction? . . . . The solution of these questions is perhaps peculiarly important here, since the Statute of Elizabeth has never been adopted in this state. . . . Our conclusion upon this branch of the case is, that courts of equity in this state, have jurisdiction, derived from the English common law, independent of the Statute of Elizabeth, to establish and enforce charities, when trustees competent to take the legal estate are named, and the class to be benefited and the individuals to be designated by the trustees, are capable of ascertainment."

In other words, though the Statute of Elizabeth has not been adopted in this state, the equity courts of California have jurisdiction over charities.

THE ELEMENTS OF A CHARITABLE TRUST

In order that a charitable trust be valid, it must be wholly charitable—the objects must be exclusively and necessarily charitable; if the objects are partly charitable and partly non-charitable, the entire trust will be invalid. (Estate of Sutro, 155 Cal., at page 734; Estate of Hinckley, *supra.*) Whether or not the whole object is charitable is a question depending upon the circumstances of each particular case—the intention of the donor as gathered from the words of the writing, if the writing is unambiguous; or, if ambiguous, the surrounding circumstances may be taken into consideration in determining the sense in which the donor intended to use the words.

Although there is a seeming conflict between the recent case of Estate of Dol, 61 C. D. 733 (1921), and the earlier cases, as to the necessity of the object of the gift being wholly charitable, all the cases may be reconciled on this ground: If there is any possibility that the gift, or any part of it, by the terms of the gift, may be used for a non-charitable purpose, the gift is void; but, if the gift is to be used by a charitable organization, and by such organization alone, the gift will be a valid charity though that institution exists for an incidental purpose which is not strictly charitable.

In all respects, save and except alone the fact that the beneficiaries in a charitable trust must be indefinite, while in a private trust they must be definite, a charitable trust is identical with a private trust. Although the beneficiaries of a charitable trust must be indefinite, the beneficiaries may belong to a small class and still be proper beneficiaries, if they are indefinite in number and

a part of the general public. (Fay v. Howe, 136 Cal. 599; Estate of Goodfellow, 166 Cal. 409; Estate of Hull, 3 Cof. Prob. Dec. 378.)

In ascertaining who are the beneficiaries, and what are the objects of the charity, extrinsic evidence is admissible to determine the intention of the donor. (Re Casement, 78 Cal. 136; Estate of Behrmann, 2 Cof. Prob. Dec. 513; Estate of Gibson, 1 Cof. Prob. Dec. 9.)

A charitable trust, like a private trust, will not be allowed to fail for the want of a trustee. (People v. Cogswell, 113 Cal. 129; Fay v. Howe, *supra.*) In Estate of Upham, 127 Cal. 90, at page 95, the court said:

> "If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustes, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

If an estate is given to trustees to be applied to such charitable purposes as they in their discretion shall judge best, and the trustees die without naming the beneficiaries, the court will be governed by the apparent intent of the donor in determining whether it can appoint new trustees. If it is determined that a peculiar personal trust and confidence were reposed in the trustees, new trustees will not be appointed. In such cases, the appointment of new trustees will be refused when it appears from the will that the testator intended that none but the persons by him named should be intrusted with the power. (Fay v. Howe, *supra;* Spence v. Widney, 5 Cal. U. 516.)

The court has no power to select the beneficiaries of a charitable trust, though specially requested in the will to do so (Pearsons' Estate, 113 Cal. 577); but the court may appoint a trustee to do so, if a trustee is referred to in the will and for any reason fails to act.

Corporations and unincorporated organizations may be trustees. (Estate of Merchant, 143 Cal. 537; Estate of Winchester, 133 Cal. 271.) However, it seems that a corporation may not be a trustee unless its charter or articles of incorporation permit it to be such. (Estate of Hull, *supra.*)

Upon the dissolution of a corporation which is trustee for a charitable purpose, the corporation may not divide its property among the stockholders (Ashton v. Dashaway Assn., 84 Cal. 61); but gifts made to the corporation upon the condition of performing certain services revert to the donor. (Victoria Hospital Assn. v. All Persons, 169 Cal. 455.)

The purpose of the trust must be definite; indefinite trusts are void in the United States where prerogative *cy pres* (of which we shall speak hereafter) is not applicable. And, in order that it be valid, the gift must define the donor's purpose clearly and certainly, and with such sufficiency that the courts, at the instance of the attorney general, can by order direct the carrying out of the trust duty. The mere fact, however, that the gift is somewhat obscure and irrational is not enough to invalidate the gift. Courts favor a liberal construction of charitable trusts, but the object of the donor must be ascertained with reasonable certainty. (Zollman, American Law of Charities, page 239.)

As to the subject matter of the trust, the same rules apply as in cases of private trusts. Likewise, there must be an intention on the part of the trustor to create a trust and an acceptance of the trust by the trustee.

CY PRES

In attempting to carry out the charitable purposes of the donor, it often happens that his specific charitable purpose cannot be effectutated. In such instances, if the case be a proper one, the courts will apply what is known as the "cy pres" doctrine.

"Cy pres" is an old French term meaning "as near as." The cy pres doctrine applies only to charitable trusts. In order that the doctrine be applicable, there must be a valid,

subsisting, vested public or charitable trust—at least in this country, where prerogative cy pres does not apply. The doctrine was recognized under the Roman or Civil law, and the system was introduced into England by the English Chancellors from the Roman law.

The doctrine rested upon what was believed to be a sound foundation. In the Middle Ages people were more or less superstitious, and when their days began to be numbered, and death was impending, they believed that by the payment of money or earthly goods they could buy a place in heaven, no matter how sinful their lives on earth might have been. At the incipiency of the courts of Chancery, the chancellors were selected from among the ecclesiastics, and, when the specific charitable purpose of the donor failed, the chancellors said: "The donor wanted his sins forgiven, and, if the fund revert to his descendants, his sins will not be forgiven; but, if the fund is used for charity, though not for the specific purpose intended, the donor will receive his place in heaven." That is, the court thought that one kind of charity would embalm the memory of the donor as well as another kind; and, being equally meritorious, would entitle him to the same reward—his place in heaven.

But, as the ecclesiastical chancellors passed, the above reason for the application of the cy pres doctrine passed, and a new basis for the application of the doctrine was adopted. The donor, in giving to charity, having manifested a general charitable intention, although the specifically designated object had failed, equity would respect and effectuate the overriding general charitable intention by applying the fund to some other charitable object similar to the one designated by the donor.

There are two kinds of cy pres recognized by courts of chancery or equity: judicial and prerogative. Prerogative cy pres is exercised by the executive or legislative branches of a government. In England, the king, as *parens patriae,* had general superintendence of all charities, and this power he committed to the chancellor, who was the keeper of the king's conscience.

Under prerogative cy pres, the objects to which the fund may be applied are unlimited—the fund may be applied to any object of charity; but if a class of objects is designated, selection must be out of that class. This prerogative cy pres was applied to two classes of cases. First, where the testator or donor expressed a general charitable intent, but designated a particular object of his bounty, if the particular object were illegal, though charitable, the Crown, through the chancellor, would direct the fund to be applied to a charitable object which was legal. Second, if the donor gave to charity generally, without specifying a particular object, without providing for trustees to select such particular object, and without indicating that the donor would subsequently make the selection himself, the chancellor, exercising prerogative cy pres, would apply the fund to an object selected by himself as the king's representative, or, under his direction, by the attorney-general.

And then there is what is known as judicial cy pres. This branch is applied by the judicial, as contradistinguished from the executive and legislative branches of the government. Prerogative cy pres does not exist in America, it being contrary to the principles upon which our government is founded. In the Estate of Hinckley, *supra,* the court expressly recognized that judicial cy pres exists in the courts of equity of California, but that prerogative cy pres does not exist.

Judicial cy pres is applied to three classes of cases. First, where the donor has manifested a general charitable intention, but has designated specific objects and these specific objects completely fail, equity, upon the failure of the specific object or objects, will direct the fund, in order to carry out the general charitable intention of the donor, to an object "as near as" possible to the specific

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Case Notes*

By ALBERT E. MARKS *of the Los Angeles Bar*

DORCHY v. STATE OF KANSAS
71 U. S. (L. Ed.) 23. (October 25, 1926)

The opinion construes Sec. 17 of the Court of Industrial Relations Act of Kansas, which among other provisions makes it a felony for an officer of a labor union wilfully to use his power to induce a violation thereof. The act, although reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining (among others). A section of the act makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate the act.

Dorchy was convicted under said act and maintained that the statute was unconstitutional. The court refused to consider whether the legislature had the power to prohibit strikes, and decided the case on the question whether under the facts shown the act was constitutional.

It was shown by the facts that there existed between the employer and employees no "industrial dispute" but the employees were ordered to strike until the employer had paid to a former employee what the court termed a "stale claim," i. e., more than two years past due.

The court held that a "strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary each party to a disputed claim may insist that it be determined only by a court. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise."

PAUL E. YOUNKIN.

LANDLORD AND TENANT: USE OF PREMISES

Plaintiff sued to cancel a lease on certain premises that plaintiff had leased to defendant for a term of years. Defendant paid rent according to the terms of the lease, but did not occupy or make any use of the demised premises. The lease was silent as to use of the premises. Plaintiff's grievance was that because of want of use and occupancy, the property was deteriorating and insurance could not be obtained. On appeal from a judgment sustaining a demurrer to plaintiff's petition, the judgment was overruled and the cause remanded. Asling v. McCallister-Fitzgerald Lumber Co., 244 Pacific (Kansas) 16. (1926.)

The majority of the court was of the opinion that where "the lease is silent as to the use, the tenant has the right to use the premises in any lawful way not prejudicial to the purpose for which they were peculiarly adapted, but, in the absence of some contractual stipulation showing a contrary intent, the landlord has the complementary right to have the premises so used; and the law will accord him justiciable redress for the tenant's failure to so use and occupy the property, if it thereby falls into a state of disrepair and deterioration such as would not naturally occur if the property were put to a proper use. And, where the contract is altogether silent as to the intended use, parol evidence

*EDITOR'S NOTE: As announced in our last issue, *Case Notes* will be one of the regular features of the *Bulletin*. Mr. Albert E. Marks, formerly Special Assistant to the Attorney General of the United States, is in charge of this department.

The *Bulletin* will be pleased to accept for publication reviews of, and comments on, recent decisions; and members of the bar are urged to cooperate with the editor in making *Case Notes* a noteworthy feature of the *Bulletin*. Reviews should be mailed to the *Bulletin* office.

is competent to show what use of the premises the parties intended."

It is a trite saying that hard cases make bad law. In its anxiety to afford relief of some character to plaintiff, the court seems to have lost its way in a maze of confused ideas.

The dissenting opinion in the principal case is in accord with the weight of authority. Refreshingly sapient, although extremely optimistic as to the possibility of diligent research by attorneys, is the observation that "if search for authority had revealed any decision that there is an implied covenant in a lease that buildings must be occupied and used, it certainly would have been cited. None of the cases cited is authority for that proposition, and profuse citation of irrelevant cases gives no better color of soundness to a judicial opinion than it does to a brief."

If social and economic conditions should demand that productive and effective use be made of all property, and at all times, then the city or State may, under the police power, enact regulations designed to accomplish this end. (Cf. the stringent rent laws affecting the use of residential property, Block v. Hirsh, 256 U. S. 134; Brown v. Feldman, 256 U. S. 170.) However, such conditions do not exist at the present time. Hence private initiative can be trusted to cope with the problem, and judicially fabricated covenants should be wholly unnecessary. If the owner of property is desirous of insuring the continuing use of his property in a particular manner, a covenant should be inserted in the lease whereby the tenant would be compelled to make such use of the property. In the absence of such a precautionary measure, the landlord should be satisfied if his tenant pays rent promptly, commits no waste, creates no nuisance, and refrains from making any illegal use of the premises. Indeed he should deem himself singularly fortunate. ALBERT E. MARKS.

MUTE CAN "TALK" SLANDER, A BORDEAUX COURT RULES

PARIS, Nov. 20 (AP).—Can the fast-moving talking fingers of a deaf mute commit slander is a problem the solons of the police court at Bordeaux have been called upon to decide.

Paraphrasing Omar Khayyam, the Court ruled that "the moving fingers talk and, having talked," made slanderous remarks.

Following a violent quarrel in a cafe one deaf mute filed a charge of slander against another. The defendant pleaded there was no case to answer, since the law required that the slanderous statements must be uttered and heard.

Complainant insisted that the required effect could be perfectly well achieved by gestures accompanied by more or less articulate cries.

Before the Court both parties, without speech, argued their points so well that the Judge had no difficulty in finding that slander could exist in pantomine.—*New York Times.*

Supersedeas in Dissolution of Corporation

(Continued from Page 20)

No court has the right to interfere with these powers, or to supervise their exercise unless the trustees are guilty of neglect of duty or abuse of power. And then only at the request of a person interested in the property in an independent action for that purpose: Rossi v. Caire, *supra*, at pp. 81-82.

The dissolution declared by the decree of the court takes place instantly upon the signing of the decree. There is no process of the court required to carry it into effect.

The situation is the same as in the case of a judgment dissolving an injunction, or in the case of a forfeiture of a charter for failure to pay the license tax.

Just as no supersedeas can issue in case of a judgment dissolving an injunction (Dulin v. Pacific W. & Co., 98 Cal. 304; Tyler v. Presley, 72 Cal. 290), no supersedeas can be issued staying the order of dissolution: Bateman v. Superior Court, 139 Cal. 140; Taylor v. Superior Court, 44 Cal. 4, p. 23.

Upon the signing of the order of dissolution, the corporation stood dissolved.

The trustees (if they distributed the assets) used no process of the court below,—*they needed none.*

There was nothing to supersede.

AFFIDAVITS AS EVIDENCE

(Continued from Page 7)

probative value. Bernon vs. Bernon, 15 Cal. App. 341, 345; O'Brien vs. O'Brien, 16 Cal. App. 103, 111.

On a motion for change of venue of a criminal case an affidavit by the defendant that he cannot have a fair and impartial trial in the county is a mere conclusion and is therefore not sufficient to justify the court in ordering a change. People vs. McCauley, 1 Cal. 379, 383.

Where a verified complaint is the basis of an application for the appointment of a receiver, a statement therein that "the mortgaged premises are insufficient to pay and discharge the mortgage debt," is a mere conclusion and will not support the appointment of a receiver, except perhaps on collateral attack. It is no better than the allegation in an injunction suit, that "plaintiff will suffer irreparable injury which cannot be compensated in damages," and this is insufficient. Bank of Woodland vs. Stephens, 144 Cal. 659, 660.

Where a verified complaint is the basis on which a temporary injunction is sought, it takes the place of an affidavit and must be treated as such, and the facts so stated must stand the test to which oral testimony would be subjected. Conclusions of law are not competent testimony, though they might stand as a matter of pleading. Willis vs. Lauridson, 161 Cal. 106, 108.

A statement in an affidavit for change of judges that "the judge entertained feelings of personal animosity towards the company, its officers and managers" is a mere conclusion and cannot be received as a fact unless actual facts stated warrant such a conclusion. Higgins vs. San Diego, 126 Cal. 303, 314.

RIGHTS OF OWNERS OF BURIAL LOTS

(Continued from Page 12)

If the nature of the cemetery use was public, under its organization, the misuse of the franchise was a public injury, and can only be redressed by a suit to dissolve the corporation, and oust the members from exercising any rights in the same; and such a suit can only be maintained by the attorney-general in the name of the state, and not at the complaint of a private individual. This is plausible, but sophistical and unsound, upon obvious principles of natural justice; for if the lot owners, by the conduct of the defendants, are suffering an injury peculiar to each individually, they ought not to be relegated for relief to the public law officers of the state, when they should have the same as a right. The grief-stricken parent who has buried a child, and the husband or wife mourning for the loss of a spouse, are much more interested in the remains of the deceased than even the sympathizing friends who attend the funeral, and decidedly more than the general public."

Despite the just and undeniable equity of the principles adjudicated by these various decisions, our Legislature has enacted a statute (Sec. 615, Civil Code), which grants the Superior Court jurisdiction to permit the sale of cemetery lands by the company upon proof that they are "not required for and are not in use for burial purposes." Leaving aside land "in use for burial purposes," the right to sell which clearly could not be granted under any circumstances, the only proof necessary for allowance of the sale by the court under this section is that the lands are not "required" for burial purposes. The word "required" has a plain and ordinary meaning which cannot be enlarged in any manner so as to include lands not actually needed for burial purposes. Yet these lands may be highly necessary to maintain the natural attraction or seclusion of the cemetery as a whole, or, as has been said, the *integrity* of the cemetery. So it would seem that under the existing law, upon proof that the land is not required for burial purposes, the court would have no choice in the matter but to permit the sale of the land for use for business purposes, thus

violating an established principle of sound morals and most obvious equity, which has been determined, almost unanimously, in the strictest sense a part of the law of the land. This section of the Civil Code should be re-enacted, and the right of the lot owners to appear and assert that a proposed sale would destroy the integrity of the cemetery should be recognized therein.

Also, at this time, a comment on the holding in In re Laurel Hill Cemetery Assn., *supra*, would not be amiss. In that case our District Court of Appeal decided that if the land sought to be sold had not been previously platted for burial lots it could be alienated regardless of the unsightliness of the uses to which it might be put. It was said in that case: "It is argued that, if such lands as those described in the complaint are sold, they may be used for unsightly purposes. That is true, but there is not a word in the statute (Id. C. C. 608) to the effect that the association ever undertook the burden of controlling either the use of, or the future improvements on, properties adjacent to the cemeteries, whether such adjacent properties were once owned by the cemetery or otherwise."

Certainly, this case and the statute remarked (C. C. 615) are far afield from the moral and equitable rights the lot owner should be entitled to, which rights have been given force and effect by numerous courts of last resort.

As noted in the Canadian case, the desire of the cemetery company to sell part of its land arises, of course, by reason of the great enhancement of the value of the land, since its acquisition, due to the growth of the community around the cemetery and the corresponding demand for business sites. This feature is discussed in Brown v. Maplewood Cemetery Assn., *supra*, where the court said: "We had not supposed that public burial places had become in this state the object of irresponsible speculation and profit, or that under legislative authority, a corporate entity might be established through which land might be secured for a small price to be devoted to cemetery purposes, whereby its value would be greatly enhanced and thus secure to the promoters of the scheme the entire usufruct, without personal investment, contribution, risk, or accountability. Unless we misapprehend the enlightened public sentiment which has largely made the mortuary law in this country, the fierce race for wealth, even in this commercial age, restrains its trafficking hands at the portals of the grave."

Let us assume an hyopthetical case to which we may apply the principles enunciated by the decisions: The cemetery usually borders on one or more extensively traveled thoroughfares. There are probably street-cars traversing at least one of these streets. The prospective purchaser, as he enters the cemetery and crosses the land between the street and the place where he purchases his lot, views all this intervening property as a barrier to the noises and disturbances of commercial activity. He relies upon this intervening property being forever maintained and perpetuated as a part of the cemetery, and with this reliance he buys his lot and buries his dead thereon.

Would he have bought this lot had he known that in a short span of years the back doors of meat markets, drug stores, groceries, and restaurants, with their inevitable alley cats, garbage cans, trash heaps, noisome smells, together with all the clatter and din resulting from human occupation—would be superimposed upon the very edge of his last resting place?

Can it be gainsaid that this lot owner did not at the time of purchasing his lot become possessed of an equitable interest in the cemetery *as an entirety?*

Would it not be dishonest, immoral and indecent—a destruction of the honest expectations of both the living and the dead—to permit the proprietors of the cemetery to reclaim, for their own enrichment, land which

has been thus relied upon as being forever dedicated and devoted to the pious and public use of a burying ground?

In the words of the Louisiana court in Burke v. Wall, *supra,* it may well be said: "It cannot be held that either law or good faith will permit persons to be induced on the faith of agreements, whether titles or not, or whether written or not, to deposit on or in the grounds of another the ashes of their valued dead and with commendable piety and affection to erect costly monuments to their memory and honor, and then that either the expressed or implied conditions of the agreement shall be broken and disregarded with impunity."

CHARITABLE TRUSTS

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object designated by the donor. The doctrine of judicial cy pres is most frequently applied to this class of cases. (Estate of Upham, 127 Cal. 90; Estate of Boyer, 123 Cal. 614; Estate of Winchester, 133 Cal. 271.) Thus in Estate of Scringer, 188 Cal. 158, the deceased devised property in trust for "The Roman Catholic Orphan Asylum, located in the City and County of San Francisco, State of California." This corporation had ceased to exist prior to the decease of the testator, by virtue of the expiration of its charter. A new corporation was organized in the same city and county shortly after the death of the testator, the name of which was "The Roman Catholic Orphan Asylum of San Francisco." It carried on the same work as its predecessor. The new corporation appeared in the case. There was no other organization of the same, or similar, name in the city and county of San Francisco. The court held that the fund would be applied cy pres to the new organization because the real beneficiaries intended were the children in the institution.

Then we come to the second class of cases where judicial cy pres may properly be applied. Where there is a general charitable intent and the specific objects named by the donor are insufficient to exhaust the whole fund, the surplus of the fund will be applied cy pres to a similar charitable object. The converse of this doctrine is also true; that is, if the fund given for a charitable purpose is insufficient to satisfy that purpose in whole, the fund will be applied to the charitable purpose up to that point where the fund is exhausted. (Estate of Peabody, 154 Cal. 173.)

There is a third case where the doctrine applies—where the donor manifests a general charitable intent, but specifies certain objects to be benefited, if the scheme proposed by the donor becomes impractical, equity will devise new means cy pres. In such case the purpose of the donor is not changed, but only the manner of carrying that purpose into effect. This, however, could be done by equity without cy pres, because it is an inherent power of equity to change the details in the manner of administering the trust. Thus in the case of Alemany v. Wensinger, 40 Cal. 288, the court permitted the trustees of a church to sell all the church property and purchase other church property at a more suitable location.

To summarize the cy pres doctrine: Prerogative cy pres does not apply in California, or in any of the United States; judicial cy pres does exist in California and in most of the United States. In order that the doctrine apply there must not only be a charity involved, but there must be a general charitable intent manifested by the donor. Moreover the specific objects mentioned by the donor must have completely or substantially failed; and, having failed, the fund must be applied to another charitable object which is "as near as" possible to the particular object specified by the donor. The fact that the donor's directions may be unwise, or that there is no beneficial application of the trust property, cannot be considered. A case for the application of the cy pres doctrine cannot be manufactured, but must arise *ex necessitate rei.*

(To be Concluded in Next Issue of The Bulletin)


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